Supreme Court, U.S.
FILED
MAR 3 1992
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

R. G. Borg, Warden, ***Petitioner,***

v.

Melvin Mikes, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In determining whether to grant a petition for writ of *habeas corpus* by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the *habeas* petitioner's case or should it review the state court's determination *de novo?*

2. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state court?

3. Did the Ninth Circuit Court of Appeals improperly grant *habeas corpus* relief, in violation of the "new rule" doctrine of *Teague* v. *Lane,* 489 U.S. 288 (1989), when it held that the evidence of the state defendant's fingerprints on the murder weapon found at the crime scene was inadequate to support his conviction because there was no additional evidence affirmatively showing that the weapon had been inaccessible to him earlier during a time when he might have innocently handled it?

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v.

Melvin Mikes, ***Respondent.***

On behalf of the State of California, petitioner R.G. Borg, Warden of the State Prison at Folsom, petitions this Court for a writ of certiorari to review a published decision of the Ninth Circuit Court of Appeals. That decision granted federal *habeas corpus* relief to a convicted murderer on grounds that the evidence of his fingerprints on a metal-pipe murder weapon was insufficient to establish his identity as the killer in the absence of other evidence showing that the weapon had been inaccessible to petitioner earlier when he innocently might have handled it. In ignoring the state court's resolution of the sufficiency claim and in devising a new component to the pre-existing rules governing federal review of such claims, the Ninth Circuit exceeded the appropriate bounds of federal *habeas corpus* review of state criminal convictions.

OPINION BELOW

The published opinion of the Court of Appeals for the Ninth Circuit is reported as *Mikes* v. *Borg*, 947 F.2d 353 (1991). A copy of the opinion is reproduced in Appendix A of this Petition.

JURISDICTION

The opinion below was filed on October 7, 1991. The Court of Appeals denied California's petition for re-hearing and suggestion for re-hearing *en banc* on December 4, 1991. As of this writing, the mandate has not yet issued, and California's motion for stay of the issuance of the mandate remains pending.

Respondent Mikes originally invoked federal court jurisdiction in this *habeas corpus* case under 28 U.S.C. § 2254.

California now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Section 2254(a) of Title 28 of the United States Code provides, in pertinent part:

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

In 1986, respondent Melvin Mikes was charged with the murder of Harold Hansen and stood trial for it in a California state court. The prosecution produced the following evidence:

In March 1980, a police officer entered the Long Beach television-repair and second-hand store owned by Mr. Hansen. The officer found empty display cases and empty jewelry boxes in the business portion of the premises accessible to the public. In the rear of the premises, he found that Mr. Hansen's living quarters had been ransacked.

Down in the back of the basement, the policeman discovered Mr. Hansen's body, face down and hands tied behind the back. The pockets of Mr. Hansen's pants were turned inside out. Six large crescent-shaped wounds, from the injuries that killed him, were visible on the back of Mr. Hansen's head.

A three-feet long chrome post lay on one side of the body. The post was wet with blood on one end, and the curvature of the end matched the shape of the victim's head wounds. A second chrome post, this one about six feet long, lay on the other side of the body. A

turnstile lay within inches of the body as well. A police investigator described these objects as "the type that are in grocery stores where they have the short three-foot pipes, then the longer ones to designate a particular area people should go . . . [and] the actual turnstile, the bar with several bars sticking out."

According to a neighbor, Mr. Hansen had purchased the chrome turnstile posts three or four months earlier in a hardware store's "going out of business" sale. When the neighbor first saw them in Mr. Hansen's basement, the turnstile was in its disassembled state. The neighbor had never seen victim Hansen allow anyone, except close friends and television technicians, into the basement of the premises.

The police lifted forty-six latent fingerprints from various objects in Mr. Hansen's shop on the day his body was found. Thirty of the forty-six prints were unidentifiable: *i.e.*, they were not clear enough to be identified as belonging to any particular person. Of the sixteen remaining lifted prints, six were identifiable as those of petitioner. Two of them -- representing petitioner's right forefinger and right little finger -- were impressed upon the middle of the bloody chrome post as part of a five-print set resembling a "grasping" pattern. The other three in the set, according to the prosecution's expert witness, were unidentifiable. Three more of petitioner's prints, from his left hand, were on the six-feet-long post. Two more of petitioner's prints were on the turnstile. Ten more prints, found in the shop and potentially identifiable, did not belong to Mikes at all.

The defense's expert witness on fingerprints testified that, although the set of prints on the middle of the three-foot post were consistent with the conclusion that they were formed in a grasp, two of those prints were

sufficiently identifiable to show that they were not those of respondent Mikes. The defense expert further testified that a print from a finger would evaporate because it would consist almost entirely of water. If the prints on the pipes consisted of oil, however, they could last indefinitely because oil does not evaporate.

A jury found Mikes guilty of felony-murder and the state court sentenced him to prison for a term of twenty-five-years-to-life. In a written opinion in 1988, a three-judge panel of the California Court of Appeal rejected Mikes' claim that the fingerprint evidence had been insufficient to establish that Mikes was the killer and unanimously affirmed the murder conviction. Appendix C. Respondent Mikes sought discretionary review of his conviction on the same sufficiency-of-evidence grounds in the California Supreme Court. That Court denied Mikes' Petition for Review later in 1988.

In February 1989, Mikes filed a petition for writ of *habeas corpus* in the federal district court for the central district of California. His sworn petition contained no averment that he was factually innocent of the murder, but instead claimed that the fingerprint evidence produced at trial had been legally insufficient to prove his guilt beyond a reasonable doubt. California filed a return to the petition and Mikes filed a traverse. In written findings, the federal magistrate reviewed the claim under the standard set forth in *Jackson* v. *Virginia*, 443 U.S. 307 (1979) -- "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" -- and concluded that the evidence was sufficient to convict Mikes because it showed that he had been present and had handled the murder weapon at the time of the

homicide. Appendix B. In rejecting Mikes' claim, the magistrate's written findings quoted with approval the California appellate court's statement that "[t]he jury is entitled to draw its own inferences as to how the defendant's prints came to be on the [object], and when . . . and to weigh the evidence and the opinion of the fingerprint experts." Appendix B. Shortly thereafter, the district court judge reviewed the record and the pleadings and, over respondent Mikes' formal objections, adopted the magistrate's findings. The judge ordered that the petition for writ of *habeas corpus* be dismissed. Appendix B.

Mikes appealed to the Court of Appeals for the Ninth Circuit. In a published October 1991 opinion authored by Judge Reinhardt, the Ninth Circuit panel considered the district court's denial of the writ *de novo,* and itself re-applied the *Jackson* v. *Virginia* test to the state-court evidence in the same way the panel said it otherwise would have applied it in directly reviewing a criminal conviction obtained by the federal government in federal court. Appendix A [slip op. 13996-13997 & n. 5]. The panel then concluded, assertedly under the *Jackson* test, that the fingerprints were insufficient to establish Mikes' identity as the killer because, the longevity of the fingerprints being uncertain, *the evidence failed to show affirmatively that the turnstile posts employed in the murder had been inaccessible to Mikes earlier* during a time when, perhaps while visiting a store containing the turnstile apparatus and posts, he innocently might have handled and left his prints on them. Appendix A [slip op. 13999-13402, 13407]. The panel at no time adverted to the merits or reasoning of the California courts that had upheld or declined to disturb Mikes' conviction, or even to the merits and reasoning of the

other federal judicial officers who also had found the state's evidence sufficient under federal constitutional standards. The panel thus reversed the judgment of the district court and remanded the case with instructions for that court to grant Mikes' petition for writ of *habeas corpus*.

California filed a petition for rehearing and a suggestion for rehearing *en banc*. In that petition, California asserted that the rationale fashioned by the Ninth Circuit in its *Mikes* opinion constituted a "new rule" of law that, under the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989), could not legitimately be imposed retroactively to invalidate a final state criminal conviction earlier upheld by state courts in reasonable good faith reliance upon then-existing rules of law. The panel denied the petition for rehearing, and the suggestion for rehearing en banc was rejected, on December 4, 1991.

Two weeks later, this Court granted certiorari in *Wright* v. *West* (No. 91-542), a case in which the Fourth Circuit had overturned a Virginia conviction on insufficiency-of-evidence grounds. The Questions Presented in the *West* petition for certiorari, as expanded *sua sponte* by this Court, embrace the issues of (1) whether a federal *habeas* court can grant relief to a state prisoner merely because it disagrees with the good faith reasonable decision of the state court and (2) whether a federal *habeas* court should defer to the state court's application of the law to the specific facts of the state prisoner's case. Citing the order granting certiorari in *West*, California requested a stay of the issuance of the mandate in this case in order to permit a timely petition for a writ of certiorari on the questions accepted for review in the Virginia case. The mandate has not yet issued, and California's motion remains pending in the Ninth Circuit.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Issues Raised in this Petition Are the Same as Those Already Pending Before this Court in *Wright v. West* (No. 91-542).

A.

On December 18, 1991, this Court granted the State of Virginia's petition for certiorari in the case of *Wright* v. *West* (No. 91-542). Two of the three Questions Presented in that case are also properly and directly presented in this one. This Court should either grant certiorari in this case as well or defer consideration of this petition until the resolution of the *West* case on its merits.

B.

In *West,* the Fourth Circuit Court of Appeals granted *habeas corpus* relief to a state prisoner convicted of larceny because, after purporting to apply the standard of *Jackson* v. *Virginia,* 443 U.S. 307 (1979), the federal court found that the prosecution's evidence at the state criminal trial had been insufficient to allow a rational juror to find beyond a reasonable doubt that the defendant indeed was the person who had stolen the victim's property. *West* v. *Wright,* 931 F.2d 262, 267-271 (4th Cir. 1991). The federal court determined that the jury could not rationally have identified West as the actual thief, beyond a reasonable doubt, on the basis of

evidence that he had been found in exclusive possession of the recently stolen property and either had failed to explain or had falsely explained his possession of it. *Ibid.*

Virginia sought a writ of certiorari, arguing that collateral relief was inappropriate where the federal court had merely disagreed with the Virginia courts' good faith and reasonable rejection of the prisoner's sufficiency-of-evidence claim in state trial and state post-conviction proceedings. In its certiorari petition, that is, Virginia asked: "May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state courts?" This Court granted certiorari on that question. Further, this Court on its own motion expanded the Questions Presented in *West* to include another related one: "In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?"

West is now in the briefing stage in this Court. Thirty-seven other States, including California, have filed an *amicus curiae* brief in *West* in support of Virginia's position.

C.

This case is just like *West.* Here, the Ninth Circuit Court of Appeals granted *habeas corpus* relief to a state prisoner convicted of murder because, after purporting to apply the *Jackson* sufficiency-of-evidence standard, it concluded that the state's evidence at trial had been

insufficient to establish that the defendant, respondent Mikes, indeed had been the person who had bludgeoned victim Hansen to death. The federal appeals court determined that the jury could not rationally have identified Mikes as the killer, beyond a reasonable doubt, on the basis of evidence that his fingerprints had been found as part of a "grasping" pattern of imprints on a chrome pipe, kept for months in the victim's basement, that had been used to inflict the victim's fatal head injuries there.

In granting relief to state prisoner Mikes, the Ninth Circuit absolutely ignored the written opinion of the California Court of Appeal that had rejected Mikes' sufficiency-of-evidence argument on direct review of his conviction. On direct review, the state appellate court adhered to the California Supreme Court's decision in *People* v. *Johnson,* 26 Cal. 3d 557, 606 P. 2d 738, 162 Cal. Rptr. 431 (1980) -- the decision that adopted the *Jackson* v. *Virginia* standard of review for California sufficiency of evidence claims -- and considered Mikes' claim under a faithful expression of that standard: "the court must review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value *such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.*" Appendix C. Under that *Johnson-Jackson* standard, the state Court of Appeal rejected Mikes' claim on its merits. Like *West,* then, this case presents the important question of whether a federal *habeas* court may grant relief to a state prisoner even where the state courts reasonably have resolved the prisoner's federal sufficiency-of-evidence claim after affording him a full and fair opportunity to present it.

D.

In the last few Terms, this Court has undertaken a reform of *habeas corpus* case law that has started to restore the writ to its proper historical position within a scheme of constitutional federalism. In this reform, the Court has treated with serious deference the legitimacy of the States' interest in finality in the administration of its criminal law. See *Coleman* v. *Thompson,* ___ U.S. ___, 111 S.Ct. 2546 (1991); *Teague* v. *Lane,* 489 U.S. 288 (1989). The Court therefore has recognized that the proper operation of the writ is not defined "simply by reference to a perceived need to assure that an individual accused of the crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson,* 477 U.S. 436, 447; *Teague, supra,* 489 U.S. at 308. Instead, the proper scope of the writ also depends to a great degree upon concerns of federalism so that the state courts' reasonable and good faith interpretations of existing precedent should be validated. See *Butler* v. *McKellar,* 494 U.S. 407, 414 (1990); *Saffle* v. *Parks,* 494 U.S. 484, 490 (1990). As might prove implicit in the grant of certiorari in *Wright* v. *West, supra,* the principles underlying this reform of *habeas corpus* law strongly suggest that a federal *habeas* court must defer to the state courts' legal resolution of a state prisoner's federal sufficiency-of-evidence claim, even if that resolution might ultimately be adjudged "incorrect," as long as the prisoner was afforded a full and fair opportunity to be heard and the state court's decision was not so incontestably wrong that no reasonable jurist could agree with it.

In this case, the reasonableness of the California Court of Appeal's decision is manifest, first, in the text

of the court's written opinion itself. First, it cannot be asserted that the prosecution at Mikes' state trial had produced "no evidence" at all tending to establish his identity as the killer. Cf. *Thompson* v. *Louisville,* 362 U.S. 199 (1959), overruled in *Jackson* v. *Virginia, supra,* 443 U.S. 307. On the contrary, his fingerprints were found on the murder weapon discovered at the scene of the crime. Because the evidence gave rise to a logical inference of Mikes' identity as the culprit, the state courts' resolution of the sufficiency-of-evidence claim against him cannot be condemned as unreasonable.

The state court opinion, moreover, conscientiously marshalled the evidentiary facts into a fuller context that further demonstrated the rational nature of the inference of identity. The court, that is, explicitly relied upon the strong persuasive force of fingerprint evidence on the issue of identity, the presence of two of Mikes' fingerprints as part of a grasping pattern on the apparent murder weapon, and the fact that the prints were found in the victim's basement, "a point of unusual access" on the premises. Appendix C. The state court, also, specifically addressed Mikes' counter-argument about the alleged inability of the experts to fix the age of the fingerprints, by determining on the basis of precedents that "the choice among several permissible inferences from circumstantial evidence was for the trier of fact, not for us." Appendix C. The state court's careful decision, then, clearly did not reflect a bad-faith abdication or a fundamental breakdown of the adjudicative process. Cf. *Hicks* v. *Oklahoma,* 447 U.S. 342 (1980) (new state appeal ordered when court's reasoning in initial one was inadequate to conform to due process requirements); *United States* v. *Leon,* 468 U.S. 897, 923 (1984) ("bare bones" affidavit insufficient

to provide "indicia" of reasonableness assuring good faith).

The reasonableness of the state court's disposition of Mikes' claim is further illuminated when viewed in the light of the opinions of the other judicial officers who reached the same conclusions. See *Sawyer* v. *Smith,* ___ U.S. ___, 110 S.Ct. 2822, 2828-2830 (1990); *Butler* v. *McKellar, supra,* 494 U.S. at 415. In particular, both the *federal* magistrate and the *federal* district court judge who first passed upon Mikes' *habeas corpus* petition undertook *de novo* reviews of the sufficiency-of-evidence question under the *Jackson* standard and nevertheless determined that the state conviction conformed to the requirements of the Constitution. Aside from the merits of the specific state court decisions in this case, it should not be forgotten that the state judicial system itself is designed to provide criminal defendants with full and fair opportunities for redress of any deprivations of their federal constitutional rights. This Court, of course, has recently expressed renewed appreciation for the conscientiousness with which state courts endeavor to faithfully protect the federal rights of criminal defendants. *Sawyer* v. *Smith, supra,* __ U.S. at __, 110 S.Ct. at 2831. Here, respondent Mikes was provided with court-appointed attorneys experienced in criminal law and with a series of full and fair opportunities to litigate his federal claim in state court, at the trial and the appellate levels, before learned judges who themselves have taken a solemn oath to enforce rights guaranteed by the United States Constitution. When the procedural protections in the criminal justice system are observed, and the system adjudicates substantive constitutional claims in good faith, any mere errors it might commit in rejecting such claims should not

necessarily be condemned as "deprivations" of constitutional rights "without due process of law." See *Parratt* v. *Taylor,* 451 U.S. 527, 535-544 (1981).

And, regardless of whether a state court on occasion might erroneously overlook a violations of a defendant's constitutional rights, those violations should not invariably be remediable in federal *habeas corpus* proceedings. Many violations of a criminal defendant's constitutional rights, it must be remembered, are almost categorically excluded from the scope of federal *habeas corpus* relief. E.g., *Teague* v. *Lane, supra,* 489 U.S. at 306 (constitutional violations recognized as such only after the finality of state court proceedings); *Stone* v. *Powell,* 428 U.S. 465 (1976) (Fourth Amendment Exclusionary Rule violations). Instead, the decision of the state court should be accorded a heavy presumption of correctness, like that already accorded in federal *habeas* proceedings to state court findings of fact. 28 U.S.C. § 2254(d). Recognizing such a presumption of correctness, rather than re-litigating each prisoner's claims *de novo,* would avoid wasteful duplication of litigation. Such duplication, of course, is especially egregious when it concerns fact-bound issues closely related to the substantive criminal law of the various States, like the sufficiency of evidence claim raised by respondent Mikes in this case. See *Jackson* v. *Virginia, supra,* 443 U.S. at 335-339 (dissenting op., Stevens, J.).

E.

This Court, therefore, should either grant the instant petition or defer consideration of it until after the resolution of *West* v. *Wright.* See, e.g., *Kenney* v. *New*

York, 388 U.S. 440 (1967); *Murray* v. *City of New York*, 308 U.S. 528, 310 U.S. 610, 311 U.S. 720 (1940).

2. The Ninth Circuit Improperly Invoked a "New Rule" of Sufficiency-of-Evidence Law to Invalidate the State Criminal Conviction.

Even if this case did not directly present the same questions that are pending before this Court in the *West* case, certiorari nevertheless would remain appropriate. For this Court in any event should consider whether the Ninth Circuit has improperly enlarged upon the *Jackson* v. *Virginia* sufficiency-of-evidence standard by adding to it a "new rule" requiring the prosecution not only to produce evidence from which a rational juror could find the essential elements of a crime beyond a reasonable doubt but to go further and produce evidence affirmatively negating exculpatory inferences that might be drawn from the evidence.

Such a component, if not positively "compelled" by precedent existing at the time of the finality of the state conviction, could not properly be invoked retroactively to grant federal *habeas* relief to a state prisoner. *Saffle* v. *Parks*, 494 U.S. 484, 487-488 (1990); *Sawyer* v. *Smith*, *supra*, ___ U.S. at ___, 110 S.Ct. at 2827 (1990); *Teague* v. *Lane*, *supra*, 489 U.S. at 299-301 (1989). A rule is not "compelled" or "dictated" by precedent, for purposes of this inquiry, if it was merely "informed by" precedent or if it was merely "controlled" or "governed" by precedent. Instead, a rule is "new" unless it was so compelled by pre-existing precedent that it is not susceptible to debate among reasonable minds. *Butler* v. *McKellar*, *supra*, 494 U.S. at 415; *Saffle* v. *Parks*, *supra*; *Sawyer* v. *Smith*, *supra*.

In this case, the Ninth Circuit held that the evidence

produced at respondent Mikes' trial was insufficient under the Due Process Clause because it did not affirmatively show that the chrome-pipe murder weapon had been inaccessible to him during a time before the murder when the fingerprints discovered on it might have been placed there innocently. Appendix A [slip op., pp. 13999, 14000, 14001, 14002, 14007]. No such requirement for the prosecution to negate possible innocent inferences was established by this Court in *Jackson.* On the contrary, *Jackson* explicitly refused to adopt a standard of review imposing upon the prosecution "an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt." 443 U.S. at 325-326.

Nor was such a standard "compelled" by any other precedent binding upon California courts before Mikes' appeal became final. Certainly, the reasonable judicial minds -- personified in the state trial judge who let Mikes' verdict stand, the Justices of the California Court of Appeal who explicitly affirmed his conviction, the Justices of the California Supreme Court who declined to review his conviction, the federal magistrate who recommended dismissal of the instant *habeas corpus* petition, and the federal district court judge who ordered it dismissed -- did not believe that pre-existing precedent compelled the result reached only by the Ninth Circuit.

Nor was the variation on the *Jackson* standard compelled by any of the precedents upon which the Ninth Circuit panel relied. The Ninth Circuit implicitly recognized this point in two ways. One was when it acknowledged that "[w]e have held that fingerprint evidence alone may be sufficient under certain circumstances to support a conviction." Appendix A [Slip op. 13997]. The second was when it set out what

it determined to be the operative rule -- *i.e.,* that "in fingerprint-only cases in which the prosecution's theory is based on the premise that the defendant handled certain objects *while committing the crime in question,* the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date" -- and then supported it with a string citation preceded by the term-of-art signal that the reader should merely "see" the cited authorities.

Those authorities, moreover, did not "compel" the result that the panel reached. For example, the panel cited *Borum* v. *United States,* 380 F.2d 595 (D.C. Cir. 1976) in support of its decision. *Borum*, however, was not controlling upon California courts. *People* v. *Bradford,* 1 Cal.3d 80, 86, 460 P.2d 129, 81 Cal.Rptr. 457 (1969). Moreover, it held that the government in that case had produced "no evidence, direct or circumstantial, which could support an inference that the fingerprints were placed . . . during the commission of the crime." 380 F.2d at 597. In Mikes' trial, however, the state indeed produced circumstantial evidence on this point: the posts were kept in a private area and various posts, including the one used as the murder weapon, contained Mikes' fingerprints. The court's reliance on *United States* v. *Lonsdale,* 577 F.2d 923 (5th Cir. 1978), and *United States* v. *Van Fossen,* 460 F.2d 38 (4th Cir. 1972), likewise did not "compel" the result in this case. In *Lonsdale,* there was affirmative evidence, rather than mere speculation, that the defendant had enjoyed previous access to the fingerprint-embossed stolen property, for he lived at the same naval station barracks as the theft victim under circumstances where the men routinely roamed into each other's rooms. 577 F.2d at

924, 926 n. 5. In *Van Fossen,* no evidence suggested the defendant's fingerprints had been placed on the suspicious engraving plates at the time of the crime because the government never even established the time of the crime. 460 F.2d at 41. Besides, in this case, the evidence of the grasp indicated that Mikes had placed his prints on the murder weapon at the time of the crime.

Indeed, some of the cases cited by the panel lent support to the State's position. In *United States* v. *Talbert,* 710 F.2d 528, 531 (9th Cir. 1983), the appellate court determined that the jury properly might reject the "theoretical" possibility that "at some time prior to the murder petitioner innocently touched the murder weapon." 710 F.2d at 531. The jury in respondent Mikes' trial rationally might have rejected that possibility, too. Similarly, the precedent of *United States* v. *Scott,* 452 F.2d 660 (9th Cir. 1971) affirmatively supported California's position in this case. There the sole evidence of the theft of bank checks consisted of the defendant's fingerprint on a battery inside a flashlight found on the night of the burglary and his print on one of the stolen checks. Two full pages of the Ninth Circuit's slip opinion in *Mikes* were consumed by the panel's careful attempt -- including an assertion not specifically mentioned in *Scott* about the previous inaccessiblilty of the stolen checks -- to distinguish *Scott.* Appendix A [Slip op. 14002-14004]. That fact alone shows that there had been no clear and compelling precedent dictating the result of Mikes' case before it became final in the state courts.

Finally, none of cases cited by the Ninth Circuit in support of its decision in *Mikes* was a *habeas corpus* case concerning the sufficiency of the evidence in support of

a state criminal conviction.

Accordingly, the Ninth Circuit's decision in this case violated the *Teague* proscription against the retroactive invocation of "new rules" to overturn a state conviction and grant *habeas corpus* relief to a state prisoner.[1/] This Court should grant certiorari to consider *Teague's* application to this type of case.

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1. Neither of the two exceptions to the *Teague* "new rule" proscription -- that for constitutional rules immunizing the defendant's charged conduct from any criminal sanction and that for rare "watershed" rules of criminal procedure -- apply in this case. See *Sawyer* v. *Smith*, *supra*, ___ U.S. at ___, 110 S.Ct. at 2831. Nobody would argue that Mikes had a constitutional right to kill Mr. Hansen. And a rule enlarging upon the *Jackson* standard in the context of post-appeal collateral review, so as to require affirmative evidence negating speculative theories of the defendant's possible innocence, could hardly be deemed a watershed that alters our understanding of "the bedrock procedural elements essential to the fairness of a proceeding." *Ibid.*

CONCLUSION

For these reasons, petitioner Borg requests that a writ of certiorari issue in this case, or that ruling on the petition be deferred pending the decision in *Wright* v. *West*.

Respectfully submitted,

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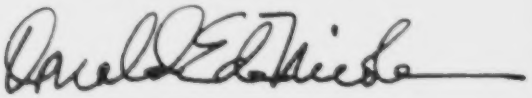

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MELVIN MIKES,
Petitioner-Appellant,

v.

ROBERT G. BORG, Warden;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellees.

No. 90-55247
D.C. No.
CV-89-1035-RB
OPINION

Appeal from the United States District Court
for the Central District of California
Robert C. Bonner, District Judge, Presiding

Argued and Submitted
November 5, 1990—Pasadena, California

Filed October 7, 1991

Before: Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges, and Jack E. Tanner, Senior District Judge.*

Opinion by Judge Reinhardt

SUMMARY

Evidence/Criminal Law

Reversing a district court judgment denying habeas relief,

*Honorable Jack E. Tanner, Senior United States District Judge for the District of Western District of Washington, sitting by designation.

the court of appeals held that inculpatory evidence consisting exclusively of fingerprints on three items, one of which was identified as the murder weapon, was insufficient by itself to allow a rational trier of fact to convict appellant of murder.

Appellant Melvin Mikes was convicted in state court of murder in the first degree and commission of an offense with the use of a deadly or dangerous weapon. Some of Mikes' fingerprints were found on three turnstile posts the victim had purchased four months before his death, one of which was identified as the murder weapon. The victim's shop had been burglarized. The government's case rested exclusively upon the fact that Mikes' fingerprints were among those found on the posts that lay adjacent to the victim's body. However, none of the fingerprints found anywhere else on the burglarized premises except on the posts were identified as Mikes'. Mikes' argued on habeas review that the inculpatory evidence, consisting exclusively of fingerprint evidence, was insufficient to support his conviction.

[1] In fingerprint-only cases in which the prosecution's theory is based on the premise that the defendant handled certain objects while committing the crime in question, the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date. [2] Here, the prosecution introduced no evidence placing the defendant at the scene of the crime—either on the day of the murder or on any other occasion. Neither did the prosecution find any items stolen from the deceased in Mikes' possession or Mikes' fingerprints on any recovered stolen property. Nor were any of the fingerprints found in the area actually burglarized identified as Mikes'.

[3] Mikes' conviction could not be upheld unless the record showed that the objects in question were inaccessible to him during the time prior to the commission of the crime during which the defendant reasonably could have placed his finger-

prints on the object in question and during which such prints might have remained on that object. [4] The evidence in the record was wholly insufficient to preclude the reasonable possibility that Mikes' fingerprints were placed on the posts during the period prior to the victim's acquisition of them. [5] To support a finding that Mikes was guilty beyond a reasonable doubt, the record had to show that he in fact touched the posts at the time the crime was committed and not at some earlier point.

[6] Unlike in *Scott*, the prosecution in this case presented no evidence that Mikes' prints were found on the allegedly stolen property. Nor did the prosecution offer sufficient evidence that the property on which Mikes' fingerprints were found was previously inaccessible to him. In addition, none of the property containing Mikes' prints was property that was brought to and left at the crime scene during the commission of the offense. [7] The clear principle arising from cases decided by other circuits is that, in a case resting upon the premise that the defendant impressed his fingerprints on an object at the time of the commission of the crime and supported solely by evidence that the defendant's fingerprints were found on that object, the record must contain sufficient evidence to permit a jury, applying the beyond reasonable doubt standard, to draw the inference that the defendant touched the object during the commission of the crime. The record in this case fell short of meeting that standard.

COUNSEL

Fern M. Laethem, State Public Defender, Michael Tanaka, Deputy State Public Defender, Jill Ishida, Deputy State Public Defender, Los Angeles, California, for the petitioner-appellant.

John K. Van de Kamp, Attorney General, of the State of California, Richard B. Iglehart, Chief Assistant Attorney General,

Edward T. Fogel, Jr., Assistant Attorney General, Donald F. Roeschke, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

REINHARDT, Circuit Judge:

Melvin Mikes, a California state prisoner, appeals the district court's order dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following a trial by jury, Mikes was convicted of murder in the first degree[1] and commission of an offense with the use of a deadly or dangerous weapon, and was sentenced to state prison for 25 years to life. The California Court of Appeal affirmed the judgment and the California Supreme Court denied Mikes' petition for review without explanation or citation of authorities. Mikes contends on habeas review that the inculpatory evidence, which consisted exclusively of fingerprint evidence, was insufficient to support his conviction. We agree.

I. Facts

On March 10, 1980, Harold Hansen was found dead in the basement of his fix-it shop, with the pockets of his clothing turned inside out. The shop, which was located on the main floor of the building had been burglarized. Near Hansen's body, police investigators found three chrome posts — a three-foot post, a six-foot post, and a "turnstile" post — all of which constituted portions of a disassembled turnstile unit.[2]

[1]Mikes was charged with and convicted of first degree murder because he allegedly committed the murder during the course of a burglary. The burglary allegation was the sole criterion for the determination of the degree of murder.

[2]Officer John Miller, one of the investigating officers in Hansen's death, testified that the posts were of "the type that are in grocery stores where

Hansen had purchased the turnstile (in assembled or disassembled form) at a hardware store's going out-of-business sale, approximately four months prior to his death.[3] The investigators determined that the assailant used the three-foot post to murder Hansen.

The government's case against Mikes rested exclusively upon the fact that his fingerprints were among those found on the posts that lay adjacent to the victim's body. The officers lifted a total of 46 fingerprints from the area designated as the crime scene. Of the 16 fingerprints that were identifiable, the police determined that six belonged to Mikes and ten did not. Thirty were not sufficiently clear to permit identification of the source. In particular, the government introduced evidence that five "consecutive" prints were found on the three-foot post — the murder weapon. The prosecution's expert testified that he identified the first and fourth of the consecutive prints as Mikes' right forefinger and right little finger, respectively. The remaining three prints on the murder weapon were unidentifiable. Three of fifteen prints found on the six-foot post, and one of two prints from the "turnstile" post belonged to Mikes. Other unidentifiable prints were also found on these posts. None of the prints taken from the fix-it shop area, where the police discovered a number of empty jewelry boxes strewn about, or from the jewelry boxes themselves, or from the stair rail leading to the basement, were identified as Mikes'.[4]

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they have the short three-foot pipes, then the longer ones to designate a particular area people should go . . . [and] the actual turnstile, the bar with several bars sticking out." There is no evidence in the record that the posts came from more than one turnstile unit. The defense argues in its brief on appeal, as it did below, that they were all part of a single turnstile. In its responsive brief, the prosecution does not take issue with that contention.

[3]There is no evidence in the record as to whether the turnstile was assembled or disassembled at the time it was purchased by Hansen. Robert Grant, a friend of Hansen's, testified that he first saw the pipes in their disassembled state after Hansen had placed them in his basement.

[4]With respect to the unidentifiable prints in the sales area, on the jewelry boxes and on the stair rail, the government expert stated that he made

In fact none of the fingerprints found anywhere on the premises except on the posts were identified as Mikes'.

II. Standard of Review

We review *de novo* a district court's decision to deny a petition for writ of habeas corpus. *Barker v. Estelle*, 913 F.2d 1433, 1437 (9th Cir. 1990). However, in reviewing the question whether the evidence was sufficient to sustain Mikes conviction, we, like the district court, must view that evidence in the light most favorable to the government and determine whether on that basis any rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Newton v. Superior Court of California*, 803 F.2d 1051, 1058-59 (9th Cir. 1986), *cert. denied*, 481 U.S. 1070, 107 S. Ct. 2464, 95 L. Ed. 2d 873 (1987). A conviction that fails to meet the *Jackson* standard violates due process and entitles the convicted defendant to habeas relief. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789 ("We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt.") (footnote omitted); *Newton*, 803 F.2d at 1058.[5]

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no effort to determine whether Mikes could be eliminated as a possible source of those prints. As a result, we do not know whether all or some of those unidentifiable prints were sufficiently clear to determine if they did *not* belong to Mikes. However, the government expert witness did testify that with respect to the unidentifiable prints on the posts he did undertake such an examination. He concluded that, with the exception of one print on the "turnstile" post, which clearly did not belong to Mikes, he could not determine whether or not those prints belonged to Mikes or some other individual(s).

[5]The standard of review for cases addressing the sufficiency of the evidence is identical for direct appeals and habeas review. *See, e.g., United States v. Talbert*, 710 F.2d 528, 530 (9th Cir. 1983) (per curiam) ("We

III. Analysis

[1] The critical question presented by this case is whether the evidence of Mikes' fingerprints on three posts, one of which was identified as the murder weapon, is sufficient *by itself* to allow a rational trier of fact to convict him of murder. The prosecution's case rested exclusively on the theory that Mikes' fingerprints were impressed on these objects *during the commission of the crime.* We have held that fingerprint evidence alone may under certain circumstances support a conviction. *United States v. Scott*, 452 F.2d 660, 662 (9th Cir. 1971). However, in fingerprint-only cases in which the prosecution's theory is based on the premise that the defendant handled certain objects *while committing the crime in question*, the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date. *See United States v. Talbert*, 710 F.2d 528, 530-31 (9th Cir. 1983); *United States v. Lonsdale*, 577 F.2d 923, 926 (5th Cir. 1978); *United States v. Van Fossen*, 460 F.2d 38, 41 (4th Cir. 1972); *Borum v. United States*, 380 F.2d 595 (D.C. Cir. 1967).[6] In order to meet this standard the prosecution must

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review the evidence produced against [the appellant] in the light most favorable to the government to determine whether substantial relevant evidence was produced from which the jury could reasonably have found [appellant] guilty beyond a reasonable doubt.) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560 (1979) and *United States v. Miller*, 688 F.2d 652, 663 (9th Cir. 1982)). Thus, the insufficiency of the evidence cases, such as *Talbert* and *Borum v. United States*, 380 F.2d 595 (D.C. Cir. 1967), which we discuss *infra* and which were decided on direct appeal, are directly applicable here.

[6]In *Talbert*, we stated that *Borum* and its progeny are applicable in cases where fingerprint evidence is the only evidence linking the defendant to the crime. *See Talbert* 710 F.2d at 531. *Borum* initially set forth the rule that, in cases where the only link between the defendant and the crime is fingerprint evidence found at the scene of the crime, the prosecution must present evidence sufficient to support an inference that the fingerprints were placed on the object(s) in question during the commission of the crime. *Borum*, 380 F.2d 595 (D.C. Cir. 1967).

present evidence sufficient to permit the jury to conclude that the objects on which the fingerprints appear were inaccessible to the defendant prior to the time of the commission of the crime. *See Talbert*, 710 F.2d at 530-31.[7]

[2] Here, the prosecution introduced no evidence placing the defendant at the scene of the crime — either on the day of the murder or on any other occasion. Nor did the prosecution find any items stolen from the deceased in Mikes' possession. Nor, unlike *Scott*, the one case in which we upheld a conviction based on fingerprint evidence alone, did the defendant's fingerprints appear on any recovered stolen property. Finally, none of the fingerprints found on any of the objects located in the area actually burglarized, the fix-it shop itself, were identified as Mikes'. The *only* evidence that the prosecution introduced to tie Mikes to the murder, or the burglary, was his fingerprints found on several posts of a disassembled turnstile — one of which posts served as the murder weapon — bought by the decedent four months prior to his death, and kept in the basement. The issue in this case is whether that fingerprint evidence, standing alone, is sufficiently probative to allow a reasonable juror to conclude beyond a reasonable doubt that Mikes committed the murder. While the government need not exclude all inferences or reasonable hypotheses consistent with innocence, *United States v. Miller*, 688 F.2d 652, 663 (9th Cir. 1982) (citation omitted); *Borum v. United States*, 380 F.2d 595 (D.C. Cir. 1967), the record must contain sufficient probative facts from which a factfinder could reasonably infer a defendant's guilt, under the beyond a reasonable doubt standard. In cases such as the one before us, there must, at the very least, be sufficient evidence in the record to permit the factfinder to determine *when* the fingerprints were

[7]From a practical standpoint, this evidentiary showing is even more critical in cases, like the one before us, in which fingerprints other than the defendant's, or unidentifiable prints, also appear on the murder weapon; however, the showing is essential even when it is only the defendant's prints that appear on a particular item. *See Borum*.

impressed; otherwise, any conviction would be based on pure speculation. *Borum*, 380 F.2d at 597. Here, the government's theory of the case rests on the premise that Mikes' fingerprints were placed on the posts at the time the crime was committed. Accordingly, we must examine the record to determine whether the fingerprint evidence is sufficiently probative to warrant the conclusion by a reasonable factfinder that the prints were placed on the posts at the time of the murder.

[3] The government argues that the posts were inaccessible to the petitioner because they were kept in Hansen's basement, a location from which Hansen excluded the general public, and which Mikes did not have permission to enter. The government's argument falls far short of showing the inaccessibility of the posts to Mikes. Mikes' conviction cannot be upheld unless the record shows that the objects in question were inaccessible to him during the "relevant time." The "relevant time" is defined as the time prior to the commission of the crime during which the defendant reasonably could have placed his fingerprints on the object in question *and* during which such prints might have remained on that object. We must examine, in each case, the circumstances surrounding the custody or location of the object, as well as its function, the accessibility of the object to the defendant, and the extent to which the object was or could have been handled by others. As we consider whether the record is sufficient to warrant the inference that Mikes did not have access to the posts during the relevant period, our inquiry must center on the specific facts regarding these circumstances; in this connection, we must carefully examine both generally and specifically the nature and character of the fingerprint evidence at issue, particularly with respect to the question of durability.

While the prosecution did not offer any evidence regarding the age of the fingerprints found on the posts, the defense expert testified that fingerprints can last indefinitely. This is consistent with the testimony of government experts in other

cases. *See, e.g., United States v. Corso*, 439 F.2d 956, 957 (4th Cir. 1971); *United States v. Collon*, 426 F.2d 939, 941 (6th Cir. 1970); *Borum*, 380 F.2d at 596. Given that the undisputed record shows that fingerprints may last indefinitely, we must next examine the custody, location, and function of the objects involved — i.e. the turnstile posts — to determine whether Mikes' prints, if impressed at an earlier date, reasonably could have remained intact until the time of the murder. Hansen purchased the posts at a hardware store's going-out-of-business sale, approximately four months before his murder. After the purchase, he placed the posts in his basement; the posts remained there until his death. The record shows that the basement area was inaccessible to the general public. The fact that Hansen did not allow the general public to enter into the basement area for the four month period preceding the commission of the crime does not, however, help the prosecution. To the contrary, it suggests that prints placed on the posts prior to Hansen s purchase of them and still on them at the time of the acquisition are likely to have remained undisturbed during the time the posts were in Hansen's possession. Therefore, the relevant period in this case is the time immediately preceding the four month period during which Hansen had custody of the posts. The question, becomes, then, whether there is a reasonable possibility that Mikes could have impressed his prints on the posts in the period preceding their purchase by Hansen, or to put it more accurately, whether the record contains sufficient evidence that the posts were inaccessible to Mikes during that period.[8]

[8]In *Stevenson v. United States*, 380 F.2d 590 (D.C. Cir. 1967), decided the same day as *Borum* (and, incidentally, involving the same defendant as *Borum*) the government introduced fingerprint evidence showing that the defendants had, at some time, touched objects found at the scene of the crime. The court held that testimony that the two objects in question had been purchased by the owner five and twelve years before the commission of the offense, respectively, and had been kept in his home during that entire period was sufficient to show that they were inaccessible to the defendant. In *Stevenson*, it was, of course, only reasonable for a factfinder to conclude that during the five and twelve year periods the objects would

[4] The testimony in the record establishes that Mikes' fingerprints were found on "ordinary" turnstile posts — the type often used in public places, such as a grocery or other commercial store. Immediately prior to Hansen's purchase, the posts were offered for sale in a hardware store as part of its going-out-of-business sale. For some indeterminate period prior to the store's offering them for sale, the posts presumably were used for their ordinary purpose and were accessible to the general public, as parts of an operating turnstile unit. The evidence in the record is wholly insufficient to preclude the reasonable possibility that Mikes' fingerprints were placed on the posts during the period prior to Hansen's acquisition of them. To the contrary, it establishes that the posts were fully accessible to the general public, including Mikes, during that period and that Mikes' fingerprints could well have been placed on the posts prior to Hansen's purchase of them. Specifically, Mikes could have handled the posts while they were in the hardware store, either in their assembled or disassembled form. Under the evidence presented, the fingerprints in question could have been placed on the posts by a person who disassembled the turnstile, a person who sold the turnstile to Hansen, or any person who considered buying the turnstile prior to Hansen's acquisition. It is also possible, though less likely, that the fingerprints could have been impressed on the

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have been handled by a number of persons and any fingerprints impressed prior to the commencement of those periods would have been obliterated. By contrast, the record here accounts for Hansen's custody of the posts for only a four month period. The posts were kept in a basement where they were unlikely to have been handled by anyone other than Hansen and then only occasionally, at most. There is no reason to believe that Hansen's handling of the posts would have obliterated all pre-existing prints and no evidence that some of the unidentified prints in the posts did not belong to someone other than Hansen or Mikes. Under these circumstances, given the nature and function of the posts and their location prior to Hansen's purchase, as well as the durability of fingerprints, the showing that the posts were inaccessible to defendant for a four month period is insufficient to permit the inference that they were inaccessible to him during the relevant period.

posts on the last occasion on which the turnstile was in general use, either in the hardware store or elsewhere.[9]

[5] In order to support a finding that Mikes is guilty beyond a reasonable doubt, the record must demonstrate that he in fact touched the posts at the time the crime was committed and not at some earlier point. Under our judicial system, the defendant has no duty to explain the presence of his fingerprints. *Borum*, 380 F.2d at 597 n.11. Likewise, he is under no obligation to illuminate any inferences from the fingerprint evidence that are consistent with his innocence. To put it more directly, the defendant need not explain how or when his fingerprints were placed on the object in question; that burden lies elsewhere. *Id.* at 597. On the basis of the record before us, a reasonable factfinder could not conclude beyond a reasonable doubt that Mikes' fingerprints were placed on the turnstile posts at the time of the commission of the crime. There is insufficient evidence to warrant that conclusion rather than the conclusion that the fingerprints were impressed on the posts at an earlier time. There is, in short, a total failure of proof on the "accessibility" question.

The government argues that this case is similar to *United States v. Scott*, 452 F.2d 660 (9th Cir. 1971), the only reported case in which we have upheld a conviction that was based on fingerprint evidence alone. *Id.* at 662.[10] We find that case

[9]The government's expert also stated that the five consecutive prints were in a "grasping-type" pattern. The government contends that this evidence provides additional support for the conclusion that Mikes used the post to murder Hansen. The argument has little persuasive force, however, because only two of the five prints were identified as Mikes and the police fingerprint experts did not find any palm or thumb prints belonging to Mikes on the post. More important, people generally grasp turnstile posts while using them for the purpose normally intended, or in connection with any of the functions discussed above. Therefore, the "grasp" does not tend to support the theory that the person whose fingerprints reflected the act of grasping used the post in a violent fashion.

[10]In *Talbert*, 710 F.2d 528 (9th Cir. 1983) and *United States v. Crenshaw*, 698 F.2d 1060, 1064 (9th Cir. 1983), we reaffirmed the rule that,

clearly distinguishable. Scott was convicted of one count of entering a federal savings and loan association with the intent to commit a felony therein, and one count of taking and carrying away with the intent to steal, certain money and property of a federal savings and loan association. We held that the *combined* fingerprint evidence presented at trial was sufficient to prove that the defendant had committed these crimes. The defendant's prints were found not only on a battery inside a flashlight left at the scene of the crime, but also on a blank check and travelers checks stolen from the association, both forms of checks having been inaccessible to the defendant prior to the offense. *Id. Scott* observed that "[t]he identification of the defendant's fingerprints upon one battery inside the flashlight might well have been insufficient circumstantial evidence to survive a motion for acquittal." *Id.* However, we concluded that "when that evidence is combined with positive fingerprint evidence upon the Association's stolen check and its stolen travelers checks, the ring of circumstantial evidence tightens around the defendant." *Id.* The facts that the defen-

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under certain circumstances, fingerprint evidence alone may sustain a conviction. *Talbert* and *Crenshaw*, however, were not "fingerprint only" cases. In *Talbert*, we pointed out that the facts in that case were "wholly unlike those cases in which only fingerprint evidence links a defendant to the crime." *Talbert*, 710 F.2d at 531. In addition to introducing evidence of the defendant's fingerprints on the murder weapon, the prosecution in *Talbert* showed that the defendant knew the victim, had a history of drug transactions with him, and knew that he kept large sums of money in a money belt. *Id.* The jury in *Talbert* also "heard testimony concerning appellant's 'joke' that he would not mind 'bumping [the victim] on the head' as well as his ambiguous remark later that he would 'pay [the victim] back when [he] got [his] hands on him." *Id.*

The conviction in *Crenshaw* also did not hinge solely upon fingerprint evidence. To the contrary, in *Crenshaw* we stated that the evidence of three clear fingerprints left by one of the robbers at the bank provided "additional" evidence of the defendant's guilt. We speculated, but did not decide, that this evidence alone *might* have been sufficient to sustain the defendant's conviction — i.e. if the other considerable evidence had not been introduced. That speculation, however, falls far short of a legal conclusion.

dant's prints were found on the flashlight left at the scene of the crime *and* that they were found on the *previously inaccessible* stolen property constituted more than sufficient proof that the defendant entered the savings and loan association and stole the checks.

[6] *Scott* is obviously an entirely different case from the one before us. *Scott* does not depend upon a showing that the defendant's fingerprints were impressed upon the objects *at the time of the commission of the crime.* Indeed, in *Scott* the defendant may well have left his fingerprints on the battery long before entering the savings and loan institution; likewise, if the defendant wore gloves during the theft (or even if he did not but had co-conspirators), his fingerprints may have been impressed on the stolen checks some time after the crime was committed. The combination of the showing that defendant's property was found at the scene of the crime and that the defendant had handled checks stolen from the association during *or after* their theft provided a sufficient basis upon which a jury could reasonably have inferred that the accused committed the crimes. Unlike in *Scott,* the prosecution in the case before us presented no evidence that Mikes' prints were found on the allegedly stolen property. Nor did the prosecution in the case before us offer sufficient evidence that the property on which Mikes' fingerprints were found was previously inaccessible to him. Finally, none of the property containing Mikes' prints was property which was brought to and left at the crime scene during the commission of the offense. Thus, *Scott* is different from the case before us in almost every material respect.

On the basis of similar, and perhaps more probative, evidence than is presented here, other circuits have concluded that fingerprint evidence is insufficient to support a conviction in the absence of an adequate showing that the fingerprints could have been impressed only at the time of the crime. In *Borum v. United States,* 380 F.2d 595 (D.C. Cir. 1967), the prosecution introduced evidence that four fingerprints taken

from empty jars that had contained a coin collection were the defendant's and that the defendant was within a mile and a half of the victim's home during at least a part of the time period within which the crime was committed. The D.C. Circuit concluded that this evidence was insufficient to sustain the defendant's conviction for housebreaking because there was no direct or circumstantial evidence indicating that the defendant touched the jars in the course of the housebreaking. *Id.* at 596-97.[11] In *United States v. Van Fossen*, 460 F.2d 38 (4th Cir. 1972), evidence of the defendant's thumbprints on two photographic negatives and one engraving plate was held insufficient to sustain his conviction of possessing plates with intent to use them in counterfeiting federal reserve notes. The Fourth Circuit held that the conviction rested on conjecture and suspicion, since there was "no evidence in the record [that] suggest[ed] that the prints were impressed when the crime was committed . . ." *Id.* at 41. In *United States v. Collon*, 426 F.2d 939 (6th Cir. 1970), the Sixth Circuit concluded that the defendant's conviction for bank robbery could not be sustained on the basis of evidence that the defendant's finger and palm prints were on a map, marked with the location of the robbed bank, found inside the getaway car. The court stated that "the mere presence of this map in the getaway car did not place the defendant . . . in the car at the scene of the robbery, or for that matter at any other time. The map could have been innocently handled by him months before the robbery and found its way into the car in any number of ways without his participation or knowledge." *Id.* at 941-42. In *United States v. Lonsdale*, 577 F.2d 923 (5th Cir. 1978), the defendant was convicted of unlawfully uttering a United States Treasury check, primarily on the basis of a fingerprint expert's testimony that the defendant's left thumb print matched a latent print lifted from the back of the check. *Id.*

[11]In another appeal decided the same day, the D.C. Circuit affirmed Borum's conviction for an unrelated incident of housebreaking and robbery on the basis of fingerprint evidence. *See Stevenson v. United States*, 380 F.2d 590 (D.C. Cir. 1967) discussed *supra* at note 8.

at 924-25. The Fifth Circuit reversed his conviction because there was no evidence tending to show that the defendant's print was impressed on the check during the course of uttering it. *Id.* at 926.

[7] The clear principle arising from the cases decided by our fellow circuits is that, in a case resting upon the premise that the defendant impressed his fingerprints on an object at the time of the commission of the crime and supported solely by evidence that the defendant's fingerprints were found on that object, the record must contain sufficient evidence to permit a jury, applying the beyond a reasonable doubt standard, to draw the inference that the defendant touched the object *during the commission of the crime.* That is a principle that we have ourselves acknowledged on more than one occasion, *see Talbert,* 710 F.2d at 530-31 (9th Cir. 1983); *Scott,* 452 F.2d at 662 (9th Cir. 1972), and that we reiterate today. Accordingly, in the case before us, the evidence in the record must be sufficient to justify a reasonable factfinder's conclusion that the posts were not accessible to the defendant during the relevant period (here, the period shortly before Hansen's acquisition of them). The record falls far short of meeting that standard.

As the court said in *Borum,* "to allow this conviction to stand would be to hold that anyone who touches anything which is found later at the scene of a crime may be convicted." *Borum v. United States,* 380 F.2d 595, 597 (D.C. Cir. 1967). Regardless of Mikes' actual guilt or innocence, we decline to establish a precedent that would permit such a result. Any determination that Mikes' fingerprints were left on the posts during the commission of the offense is unreasonably speculative.

CONCLUSION

We do not purport to set forth a rule specifying the precise quantum of fingerprint evidence needed to sustain a convic-

tion. But, in a case in which the prosecution's theory is that the defendant's fingerprints were placed on the murder weapon at the time of the commission of the crime or were left at the scene of the crime during its commission, the record must show that the object was inaccessible to the defendant or that the defendant did not have access to the crime scene, during the relevant period prior to the crime's commission. The prosecution here rested its case upon the theory that Mikes' fingerprints were placed on the murder weapon at the time the crime was committed; however, the record fails to establish that the turnstile posts were inaccessible to him during the relevant period preceding the commission of the offense. We therefore hold that Mikes' conviction violated his right to due process. Accordingly, the judgment of the district court is reversed and the case is remanded to that court with instructions to grant the writ of habeas corpus.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED: August 9, 1989

MELVIN MIKES, Petitioner, v. ROBERT G. BORG, Warden, et al., Respondent(s).	NO. CV 89-1035-RB(K) FINDINGS ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

On February 22, 1989, petitioner, a state prisoner at Represa, California, was permitted to file this petition for a writ of habeas corpus, by counsel, in forma pauperis, pursuant to 28 U.S.C. § 1915(a).

The Magistrate called for a response which was filed on March 20th, petitioner filed a Traverse on April 4th, and the matter was thereafter submitted.

The Magistrate has read and considered the pleadings as well as the exhibits presented and makes the following findings.

After a jury trial in the Superior Court of the

State of California for the County of Los Angeles, petitioner was convicted of first degree murder. (Cal. Pen. Code, § 187; CT 121.) He is currently serving a term of 25 years to life. His conviction was affirmed on appeal, and a hearing was denied by the Supreme Court of the state. There has been exhaustion of state remedies.

Petitioner alleges that the evidence is insufficient to support his conviction.

The only evidence against petitioner were fingerprints on some metal pipes lying next to the victim, whose body was found in a basement area of his shop after an apparent robbery. Adjacent to the body were a three foot metal pipe, a six foot metal pipe and a turn-stile such as used in grocery stores. (RT 63-68, 129-130.) There was blood on the short pipe from the base to up about 20 inches. (RT 64-65.) A number of identifiable prints were found on the pipes. Six or seven were identified as petitioner's. (RT 113-116.) Two of petitioner's prints were lifted from the middle 18 inches of the three foot pipe. (RT 91-95, 116.) Three of petitioner's prints were lifted from the six foot pipe, and two prints were found on the turn-stile. (RT 116.) There was evidence that the short pipe had been used to kill the victim. (RT 65-66.)

The victim had purchased these items three or four months before his death at a going-out-of-business sale. (RT 129-130.)

There was no evidence as to when the fingerprints had been placed on the items; there was evidence that they could last indefinitely. (RT 204.)

There was no other evidence to place petitioner near or at the scene around the time of the commission of the offense and there was no prior relationship shown between petitioner and the victim. There was evidence that the murder scene was not accessible to the public. (RT 131-132.)

Petitioner argues that the prints alone are legally insufficient to sustain his conviction.

The question is whether the evidence could reasonably support a finding of guilty beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307 (1979).

> "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 318-319.

Petitioner cites numerous federal cases for the proposition that fingerprint evidence alone is insufficient. The Magistrate finds that they are distinguishable. In the present case, petitioner's prints were found not on one, but on three items in the immediate vicinity of the victim, all of which had apparently been displaced during the commission of the crime. Expert testimony about the prints on the murder weapon suggested that the person was grasping the pipes. (RT 94-95, 102-103.) Rather than merely proving that at some time petitioner touched these items, the evidence indicated that he was present and touched them at the time the offense was committed.

As pointed out by the California Court of Appeals, "[t]he jury is entitled to draw its own inferences as to how the defendant's prints came to be on the [object], and when . . . and to weigh the evidence and opinion of the fingerprint experts." (Resp. Ex. A, 15.) The fact that the circumstances might also be reasonably reconciled with a contrary finding, does not justify a reversal. Choice among the several permissible inferences from the circumstantial evidence was for the trier of fact. The Magistrate is mindful of the jury instruction re circumstantial evidence which holds that defendant must be given the benefit of a doubt if two reasonable explanations, one of which points to innocence are presented. In the instant matter, there is evidence of a reasonable explanation which links the defendant to the commission of the crime. There is no evidence to the contrary, merely speculation.

The petition presents only issues of law. No evidentiary hearing will be necessary.

The Magistrate finds that it appears from the petition and return that petitioner is not entitled to a writ of habeas corpus. The petition should be denied pursuant to 28 U.S.C. § 2243.

IT IS THEREFORE RECOMMENDED that an Order be issued by this Court denying the petition and dismissing the action.

Dated: This 9th day of August, 1989.

/s/ John R. Kronenberg
JOHN R. KRONENBERG
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED: August 29, 1989

MELVIN MIKES, Petitioner, v. ROBERT G. BORG, Warden, et al., Respondent(s).	NO. CV 89-1035-RB(K) ORDER

Pursuant to 28 U.S.C. § 636, the Court having reviewed the record and pleadings as well as the findings of the United States Magistrate, concurs with and adopts those findings.

Each party will bear its own costs.

IT IS FURTHER ORDERED that the Clerk of this Court shall serve a copy of the Judgment, of this Order and of the findings of the United States Magistrate by United States mail upon counsel of record for both parties.

DATED: This 29 day of August, 1989.

/s/ Robert C. Bonner
ROBERT C. BONNER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED: August 9, 1989
LODGED: August 29, 1989
ENTERED: August 31, 1989

MELVIN MIKES,	)	NO. CV 89-1035-RB(K)
	)	
Petitioner,	)	
	)	
v.	)	JUDGMENT
	)	
ROBERT G. BORG, Warden, et al.,	)	
	)	
Respondent(s).	)	
	)	

IT IS ADJUDGED that the petition is dismissed.

DATED: This 29 day of August, 1989.

/s/ Robert C. Bonner
ROBERT C. BONNER
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: December 4, 1991

MELVIN MIKES, Petitioner-Appellant, v. ROBERT G. BORG, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	NO. 90-55247 D.C. NO. CV-89-1035-RB ORDER

Before: D.W. NELSON and REINHARDT, Circuit Judges, and TANNER, Senior District Judge*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* Honorable Jack E. Tanner, Senior United States District Judge for the District of Western District of Washington, sitting by designation.

APPENDIX C

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE
FILED: August 29, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs and Respondents, v. MELVIN MIKES, Defendant and Appellant.	B026641 (Super. Ct. No. A031957)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed.

. . . .

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules of appellate review (People v. Barnes (1986) 42 Cal.3d 284, 303), the evidence established that Harold Hansen

operated and resided in a TV repair and second hand store on East 10th Street in Long Beach. Hansen's store occupied the front portion of the street level of the building. His living quarters and TV repair area were in the rear of the same level. Hansen had divided the basement level of the premises into two sections. The front portion contained a workshop and a storage area for old tvs. In the other end of the basement there were boxes, tables and chairs and a low stage with a set of drums.

On March 10, 1980, Investigating Police Officer John H. Miller (Miller) found the accordion type grate protecting the public entry to the shop in place and locked. A rear door on the street level provided the only other access. A glass display case in the area of the shop accessible to the public was empty as were ring boxes Miller found on the floor of the shop. Hansen's living quarters had been ransacked.

Miller found Hansen's body in the rear portion of the basement. Hansen lay face down with his hands tied behind his back. A pillow had been placed over Hansen's head and his trouser pockets had been pulled inside out. On each side of Hansen's body lay chrome plated metal posts. The shorter post, found on Hansen's right side, was about three feet long. Its heavy metal base had blood on it and its shape matched the wounds on Hansen's head.

An identification officer lifted 46 latent fingerprints from various areas of the shop. Of these, five were found on the short chrome post, fifteen on the long chrome post and two on another chrome pipe. The prints from the middle portion of the short chrome post "were obtained in a consecutive order like a grasping-type situation . . . [a]s if someone was holding or lifting

the short pole." These prints were numbered lifts 25 through 28.

An expert determined two of these prints, lifts numbers 25 and 28, had been made by Mikes' right index and right little finger. Mikes' left hand fingerprints were found on the long chrome pole and on the other pipe. Ten other fingerprints, found in the shop and determined to be potentially identifiable, did not belong to Mikes, possibly indicating the presence of a criminal companion.

Robert Grant, a long time friend of the deceased who visited Hansen three or four times a week, had seen the chrome posts at the shop some three or four months before Hansen's death. Hansen told Grant he had purchased them at Imperial Hardware's going-out-of-business sale. Grant had never seen Hansen allow anyone into the basement area of the store.

The parties stipulated Hansen's death had been caused by multiple traumatic injuries to the head and that he had been killed between the hours of 3 and 6 p.m. on March 10, 1980.

. . . .

DISCUSSION

A. The Evidence was Sufficient to Sustain the Conviction

Appellant's initial contention is that the fingerprint evidence adduced below was insufficient to sustain the murder conviction. We find this challenge to the evidentiary sufficiency to support the conviction below to be without merit.

In assessing a sufficiency of evidence challenge, "the court must review the whole record in the

light most favorable to the judgment below to determine whether it discloses substantial evidence-that is, evidence which is reasonable, credible, and of solid value-such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (People v. Johnson (1980) 26 Cal.3d 557, 578.) "In our review, we 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence' (People v. Reilly (1970) 3 Cal.3d 421, 425, ...)" (People v. Poggi (1988) 45 Cal.3d 306, 325.)

Appellant correctly notes the only evidence linking him to the offense was the presence of his fingerprints on the murder weapon. Fingerprint evidence is, however, "the strongest evidence of identity and is ordinarily sufficient alone to identify the defendant." (People v. Gardner (1969) 71 Cal.2d 843, 849; People v. Powers (1984) 151 Cal.App.3d 905, 910.) Moreover, "[t]he jury is entitled to draw its own inferences as to how the defendant's prints came to be on the [object] and when . . . and to weigh the evidence and opinion of the fingerprint experts." (People v. Gardner, supra, 71 Cal.2d at p. 849.) (Emphasis added.)

"Several cases have held that evidence of a fingerprint, palm print, or footprint, left inside a structure or at a point of unusual access is alone sufficient to support a burglary conviction." [Citations omitted.] (People v. Bailes (1982) 129 Cal.App.3d 265, 282.)

While the case at bench involves a conviction for murder in the first degree rather than burglary, the principles set forth in Bailes are no less compelling. In the instant case, appellant's fingerprints were found on an object identified as the probable murder weapon in that it was found near decedent's head and covered with blood. Moreover, the position of the five fingerprints on

the apparent murder weapon, two of which were positively identified as appellant's suggested that the object was grasped by the individual whose prints appeared thereon. Significantly, these fingerprints were obtained not only within the structure wherein the homicide occurred but in the basement thereof, "a point of unusual access . . . ." (Ibid.)

Although appellant argues the fingerprint evidence in the instant case is insufficient to sustain the conviction given the alleged inability of the fingerprint expert to determine the age of appellant's prints found at the crime scene, this argument ignores the well settled principle that "[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" (People v. Redrick (1961) 55 Cal.2d 282, 289.)

Thus, in the case at bench as in People v. Jenkins (1979) 91 Cal.App.3d 579, 584, an authority on which appellant relies for his assertion of evidentiary insufficiency, "[w]hile the portability of the . . . [objects] would permit equally plausible inferences that defendant touched them at a place other than the . . . [crime scene] or at a time . . . [other than when the crime was committed], the choice among the several permissible inferences from circumstantial evidence was for the trier of fact, not for us. (People v. Redrick, (1961) 55 Cal.2d 282, 289-290.)"

Justice Kaus' insightful observation in Jenkins dictates our acceptance of the obvious choice of the jury as the trier of fact between the permissible inferences as to how and when appellant's fingerprints were left on the murder weapon in the instant case. "[B]ecause guilt

could reasonably be inferred beyond a reasonable doubt, it does not matter that innocence could also have been inferred. (Citation.)" (People v. Poggi, supra, 45 Cal.3d at p. 326.)

In light of the foregoing we must reject appellant's claim of insufficiency of the evidence as being without merit.

. . . .

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

Curos, J.*

We concur:

ARABIAN, Acting P.J.
CROSKEY, J.

* Assigned to the Chairperson of the Judicial Council.

Supreme Court, U.S.
FILED
MAY 20 1992
OFFICE OF THE CLERK

No. 91-1467

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

R.G. BORG, Warden,

Petitioner,

v.

MELVIN MIKES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

1. In determining whether to grant a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific factors of the habeas petitioner's case or should it review the state court's determination de novo?

2. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state court?

3. Did the Ninth Circuit Court of Appeals improperly grant habeas corpus relief, in violation of the "new rule" doctrine of Teague v. Lane, 489 U.S. 288 (1989), when it held that the evidence of the state defendant's fingerprints on the murder weapon found at the crime scene was inadequate to support his conviction because there was no additional evidence affirmatively showing that the weapon had been inaccessible to him earlier during a time when he might have innocently handled it?

* * * * * *

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No. 91-1467

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

R.G. BORG, Warden,

Petitioner,

v.

MELVIN MIKES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent incorporates by reference the statement of facts as outlined in the Ninth Circuit's opinion below.

In addition, petitioner filed his Return to Petition for Writ of Habeas Corpus in the Central District Court on March 20, 1989 and his Appellee's Brief in the

Ninth Circuit on June 26, 1990. In neither pleading was a Teague claim raised.

REASONS FOR DENYING THE WRIT

1. The Ruling Petitioner Seeks From This Court Regarding the Standard of Review in Habeas Cases Would Require This Court to Violate Principles of Separation of Powers and Stare Decisis

The facts of this case were undisputed. The only evidence of guilt were respondent's fingerprints on the post believed to be the murder weapon. Other fingerprints were also on that post, fingerprints which were capable of identification, but were not respondent's. Respondent did not testify. Respondent raised the federal constitutional issue of sufficiency of evidence under Jackson v. Virginia, 443 U.S. 307 (1979). Because the facts were undisputed, the state court's analysis of the sufficiency issue required only an application of the federal law of sufficiency to the facts of the case. The Ninth Circuit applied the Jackson standard and, relying on longstanding federal authority, reversed the state court's decision.

Petitioner does not contend that the Ninth Circuit improperly exercised its authority in reaching its decision. Rather, petitioner is asking this court to change the de novo standard of review of federal constitutional questions on habeas corpus. In its stead, petitioner promotes a standard which would require the federal court to accord

deference to a state court's application of federal law in the same manner it is required to accord a presumption of correctness to the state court's finding of facts. (Petn., p. 14.) Such a ruling by this Court would foreclose federal court jurisdiction over federal constitutional issues where only Congress has the authority to delineate the jurisdiction of the federal courts in habeas corpus cases, thereby violating the doctrine of separation of powers. Furthermore, it would be contrary to a line of cases dating back decades which have interpreted the habeas statute require a de novo standard of review.

Under article III, section 1 of the Constitution, it is Congress that is vested with the power to confer federal jurisdiction. In interpreting the habeas statute, this Court in Brown v. Allen, 344 U.S. 443 (1953) made explicit that in reviewing federal constitutional issues on habeas a de novo standard of review was required. Justice Frankfurter, writing a second opinion for the Court, explained that:

> State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide. . . .
>
> Where the ascertainment of the historical facts does not dispose of the claim but calls for

interpretation of the legal significance of such facts . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so called-mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge. (Id. at pp. 506-507.)

The Court recognized that the principle of separation-of-powers would be violated if the Court circumscribed that jurisdiction:

> It is not for us to determine whether this power should have been vested in the federal courts. . . . [T]he wisdom of . . . a modification in the law is for Congress to consider . . . . (Id. at pp. 499-500.)
>
> All that has gone before is not to be ignored as irrelevant. But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have . . . . (Id. at p. 500.)

After Brown, Congress considered numerous plans to revise habeas corpus to require the federal courts to defer to the state courts' decision on federal claims. E.g. H.R. 5649, H.R. Rep. No. 1200, 84th Cong., 1st Sess. (April 11,

1955), discussed in Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50 (1956). No such plan, however, was passed, and this Court continued to confirm the holding in Brown that the federal courts are not to defer to previous state court application of federal law to particular facts. Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963).

In 1966, Congress did act in the area of habeas corpus. For purposes of this discussion, there were two significant changes. The first was to add subsection 2254(a) which reads:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

On its face, this new statute confirmed the federal courts' obligation to receive petitions from state prisoners to review for federal error and to correct those errors, particularly since it was enacted only three years after Noia, Townsend, and Sanders. The second change was to add section 2254(d) which requires the federal court to defer to

state courts' findings of fact. Had Congress intended the federal courts to defer to state courts' application of law as well as findings of fact, it would have said so.

Congress' failure to act on the issue of the standard of review should not be deemed an invitation to this Court to act. The jurisdiction of the federal courts is purely a matter of statute which is within the power of Congress to determine. This Court has been mindful of the separation of powers doctrine in other contexts:

> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our constitution vests such responsibilities in the political branches.

TVA v. Hill, 437 U.S. 153, 195 (1978). So too in this case should the court respect the political judgment reached by the legislative branch and leave it to the wisdom of Congress to alter the standard of review on habeas.

In addition to the doctrine of separation of powers, the principle of stare decisis compels this Court to continue to use the de novo standard of review. Since 1966, this Court has continued to employ a de novo review standard to state courts' application of federal law. Estelle v. McGuire, 112 S. Ct. 475 (1991); Miller v. Fenton, 474 U.S.

104 (1985); Sumner v. Mata, 449 U.S. 539 (1981). Considerations of stare decisis are particularly important in cases where this Court has given a federal statute an authoritative interpretation, and Congress has had ample time to reject that interpretation. Hilton v. South Carolina Public Railways Commission, 112 S.Ct. 560, 564 (1991).

Petitioner asserts that this Court's recent opinions in the area of habeas, Teague v. Lane, 489 U.S. 288 (1989), Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990), strongly suggest that the federal courts must defer to the state courts' application of law to facts. (Petn., p. 11.) These cases, however, do not address the plenary nature of review by the federal courts, but only the scope of cases which can be reviewed on habeas. The Teague line of cases establish that new rules of constitutional law announced after a conviction becomes final should not be applied by federal courts in habeas proceedings. Whether the habeas petitioner is seeking relief under a new rule is a threshold question decided before the federal court reviews the merits of the claim. If there is no new rule, then review is de novo. In post-Teague cases, Lewis v. Jeffers, 110 S.Ct. 3092, 3102-3104 (1990) and Estelle v. McGuire, 112 S. Ct. 475, 481-482, this Court has applied a de novo standard of review to mixed questions of fact and law.

This Court should not grant certiorari on the issue of the standard of review for several reasons. First, it is for Congress to designate the jurisdiction of the federal courts, and action by this Court would violate the doctrine of separation of powers. Second, this Court's longstanding interpretation of the habeas statute as requiring de novo review should be adhered to under principles of stare decisis. Last, this court's recent decisions do not indicate a change in the standard of review in habeas cases is warranted. Certiorari should be denied.

2. Petitioner Did Not Raise a Teague Claim Below. Furthermore No "New Rule" of Law Was Established in the Opinion Below

Petitioner seeks a grant of certiorari on a Teague issue which he failed to raise below. Petitioner filed his Return to Petition for Writ of Habeas Corpus in the District Court on March 16, 1989, and his Appellee's Brief in the Ninth Circuit on June 26, 1990, both after the date of Teague v. Lane, 489 U.S. 288 (1989). Although respondent's claim has been the same throughout state and federal court -- that the evidence was insufficient to sustain the conviction -- petitioner did not raise a Teague claim in either pleading. As a result, neither the Magistrate's Findings in the District Court, nor the Ninth Circuit opinion discuss Teague. Instead, both courts resolved the case on Jackson v. Virginia grounds. It was not until

petitioner lost in the Ninth Circuit that he raised a Teague claim in his Petition for Rehearing.

This court should not grant certiorari on the Teague issue where petitioner failed to raise the issue below, and as a result respondent did not have the opportunity to address the issue below and neither court below considered the issue. "It is only in exceptional cases . . . that questions not pressed or passed upon below are reviewed." Duignan v. United States, 274 U.S. 195, 200 (1927); Youakim v. Miller, 425 U.S. 231, 243 (1976). If a Teague claim exists in this case, it is not extraordinary and was waived by petitioner when he failed to raise the issue before rehearing.

The Teague defense of nonretroactivity is not jurisdictional and, thus, the burden of raising the defense was on petitioner and not on the federal courts sua sponte. Collins v. Youngblood, 110 S.Ct. 2715, 2718 (1990). That the burden is allocated in this manner is consistent with the general rule that allocates to the responding party the burden of pleading habeas corpus defenses. See e.g., Amadeo v. Zant, 486 U.S. 214, 228, fn. 6. (1988) (procedural default defense); Granberry v. Greer, 481 U.S. 129 (1987) (non exhaustion defense); Sanders v. United States, 373 U.S. 1, 10 (1963) (abuse of writ bar). Moreover, the reliance- and finality-based interests that the Teague nonretroactivity defense serves belongs to the state, hence

it should be the state's responsibility to assert that defense. Because petitioner did not raise this defense before, he should not now be heard on this issue before this Court.

Furthermore, no "new rule" was established in this case, and thus, Teague is not applicable. Petitioner argues that the court of appeals below created a new Jackson v. Virginia sufficiency of evidence standard by requiring the prosecution to not only produce evidence from which a rational juror could find the essential elements of a crime beyond a reasonable doubt, but to also produce evidence which affirmatively negates exculpatory inferences that might be drawn from the evidence. (Petn., p. 15.) The court of appeals did not so hold. Indeed, the court expressly rejected this "holding" which petitioner argues it embraced when it recognized that the prosecution is not obligated to "exclude all inferences or reasonable hypotheses consistent with innocence." (Petn., Appen. A [slip opn., p. 13998].) What the court did hold is that the Jackson v. Virginia standard is not met in a fingerprints-only case where the prosecution case is based on the premise that the defendant placed his fingerprints on the incriminating object at the time of the crime, but the prosecution fails to present evidence from which the jury could reasonable infer that the prints were placed on the

object at the time of the crime. (Petn., Appen. A [slip opn., p. 13998].)

That holding established no new rule under Teague. A case announces a new rule "only where the rule breaks new ground or imposes new obligations on the States or the Federal Government." Teague v. Lane, 489 U.S. 288, 301 (1989). There is nothing new in the court of appeals treatment of the Jackson v. Virginia standard. The gloss which petitioner argues the court added to the Jackson standard was repudiated by the court; no such expansion of the Jackson standard was announced in the opinion below. Instead, the court simply set forth the Jackson standard and applied it to the undisputed facts of the case. Petitioner's real quarrel is not with the court's treatment of the Jackson standard, but with the de novo standard of review and the court's conclusion that the fingerprint evidence in this case did not constitute sufficient evidence. There is, however, nothing new in the court's application of the Jackson standard to the facts of this case.

The court's holding regarding what constitutes sufficient evidence in a fingerprints-only case merely reiterated what that court and other circuits had previously held. United States v. Talbert, 710 F.2d 528 (9th Cir. 1983); United States v. Lonsdale, 577 F.2d 923 (5th Cir. 1978); United States v. Fossen, 460 F.2d 38 (4th Cir. 1972);

Borum v. United States, 380 F.2d 595 (D.C. Cir. 1967). (Petn., Appen. A [slip opn., p. 13997].) In reaching its conclusion that the facts of this case did not establish sufficient evidence, the court relied on factually similar cases which also found insufficient evidence. United States v. Lonsdale, 577 F.2d 923, United States v. Van Fossen, 460 F.2d 38; United States v. Collon, 426 F.2d 939 (6th Cir. 1970); Borum v. United States, 380 F.2d 595. (Petn., Appen. A [slip opn., pp. 14004-14006].) Those cases represented opinions from numerous circuits dating as far back as 1967. That petitioner's complaint is with the outcome of the case and not the court's "expansion" of the Jackson standard is evidenced by petitioner's contention that the facts of this case were more similar to those in United States v. Talbert, 710 F.2d 528 (9th Cir. 1983) and United States v. Scott, 452 F.2d 660 (9th Cir. 1971), instead of the cases relied on by the court. (Petn., p. 18.) Those cases, however, are factually distinguishable, and the court of appeals fully and carefully discussed those distinctions in its opinion. (Petn., Appen. A [slip op., pp. 14002-14003].

There is no Teague issue to resolve in this case. The court of appeals did not change the Jackson v. Virginia sufficiency of evidence standard in its opinion. The court simply looked at the undisputed facts of this case and, relying on established case law, determined that the facts

of this case did not satisfy the Jackson standard. The writ of certiorari should be denied.

* * * * * *

CONCLUSION

For the foregoing reasons, respondent Mikes requests that the writ of certiorari be denied.

DATED: May 20, 1992

Respectfully submitted,

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Deputy State Public Defender
Counsel of Record

Attorneys for Respondent

No. 91-1467

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

R.G. BORG, Warden,

Petitioner,

v.

MELVIN MIKES,

Respondent.

CERTIFICATE OF SERVICE

I, JILL ISHIDA, a member of the Bar of this Court, hereby certify that on May 20, 1992, a copy of the Motion to Proceed In Forma Pauperis and Respondent's Brief in Opposition in the above-entitled case were mailed, first-class postage prepaid, to counsel for petitioner:

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I further certify that all parties required to be served have been served.

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